

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE  
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

2008 DEC 16 PM 3:25

RICHARD R. BOCKNER, CLERK

STATE OF TENNESSEE, *ex rel.* ROBERT E.  
COOPER, ATTORNEY GENERAL,

Plaintiff,

v.

CONSUMER DEPOT, LLC, et al.,

Defendants.

No. 06C1093

**T-2 Designation**

JURY TRIAL

**ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO  
PLAINTIFF, STATE OF TENNESSEE ON THE ISSUE OF THE  
INAPPLICABILITY OF DEFENDANTS' AFFIRMATIVE DEFENSES**

**Introduction**

The plaintiff, State of Tennessee ("Attorney General" or "State") has moved for partial summary judgment against all Defendants on the issue of whether Defendants' affirmative defenses apply in this civil law enforcement proceeding brought under the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq.*

The State argues that Defendants' affirmative defenses do not apply as a matter of law in this case because the Attorney General's ability to proceed on behalf of the public in a TCPA enforcement action may not be altered, amended, obstructed or abolished in any way by a defendant or other third party under Tenn. Code Ann. § 47-18-113(b). In addition, the State argues that Defendants' affirmative defenses are also inapplicable because they (1) constitute third-party contract defenses which may not be asserted against the State as a non-party to the contracts; (2) may not be asserted against the State when it acts as a sovereign; and/or (3) constitute legally irrelevant business defenses which are not applicable in TCPA cases.

The issues before the Court in the present motion concern questions of law and no material facts relevant to the instant motion are in dispute. The Court has reviewed this matter and has considered and reviewed the pleadings and exhibits of record, as well as argument of counsel. As more fully set forth below, the Court concludes that partial summary judgment is appropriate as a matter of law and shall be awarded to the State.

## **FINDINGS OF FACT**

### **A. The Parties**

1. The plaintiff is the State of Tennessee, *ex rel.* Robert E. Cooper, Jr., Attorney General, and has the authority to enforce the Tennessee Consumer Protection Act of 1977, Tenn Code Ann. § 47-18-101, *et seq.*, through a civil law enforcement proceeding.<sup>1</sup>

2. Defendant Consumer Depot, LLC (“Consumer Depot”) is a Tennessee limited liability company with its principal place of business at 3332 Powell Avenue, Nashville, Tennessee.<sup>2</sup> Consumer Depot sells various electronic and computer goods to the general public from its retail facility located at 3332 Powell Avenue, through Consumer depot’s website and through third-party internet auction websites such as eBay.<sup>3</sup>

3. Defendant Martin Randolph Fike (“Martin Fike”) is a Tennessee resident and a shareholder, officer, employee and manager of defendant Consumer Depot and controls and manages Consumer Depot in its day-to-day activities.<sup>4</sup>

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<sup>1</sup> See Answer to Amended Complaint, ¶ 2, Ex. A. All Exhibit references are to the State’s Exhibits filed in support of its Motion for Partial Summary Judgment, unless otherwise noted.

<sup>2</sup> *Id.*, ¶ 3.

<sup>3</sup> *Id.*, ¶ 13.

<sup>4</sup> *Id.* at ¶ 5.

4. Defendant Carol Fike (“Carol Fike”) is a Tennessee resident and a shareholder, officer, employee and manager of defendant Consumer Depot and helps control and manage Consumer Depot in its day-to-day activities.<sup>5</sup> Carol Fike has also participated in formulating policy for Consumer Depot and supervises certain Consumer Depot employees and departments.<sup>6</sup> In addition to her husband Martin Fike, Carol Fike is the only other owner of Consumer Depot.<sup>7</sup>

5. Defendant Michael Hinds (“Michael Hinds”) is a Tennessee resident and an employee and agent of Consumer Depot and has personally and actively participated in many of its day-to-day activities.<sup>8</sup> Hinds has some authority as an agent or employee to act on behalf of Consumer Depot.<sup>9</sup> Hinds has also participated in formulating policy for Consumer Depot and supervises certain Consumer Depot employees and departments.<sup>10</sup>

6. Defendant Auction Logistix, LLC (“Auction Logistix”) is a Tennessee limited liability company with a principal place of business at 3332 Powell Avenue, Nashville, Tennessee. At all times relevant hereto, Auction Logistix has actively participated in Defendants’ sales and advertising, including the sale and advertising of Defendants products and the facilitation of consumers’ payments for such products.<sup>11</sup> Auction Logistix has also served as Defendants’ agent<sup>12</sup> and has processed all of Defendants’ eBay or internet customer

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<sup>5</sup> *Id.* at ¶ 6.

<sup>6</sup> *Id.*, ¶ 11 (Admitting third sentence of ¶ 11 of Amended Complaint).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, ¶ 7.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*, ¶ 12 (Admitting second sentence of ¶ 12 of Amended Complaint).

<sup>11</sup> *Id.*, ¶ 4 (Admitting first three sentences of ¶ 4 of Amended Complaint).

<sup>12</sup> *Id.*, ¶ 4.

payments.<sup>13</sup>

7. Fike created Consumer Depot on March 30, 1995 and Auction Logistix on June 2, 2004.<sup>14</sup> Fike has served as the managing member of Consumer Depot and Auction Logistix since their inception and has been actively involved in their day-to-day activities.<sup>15</sup>

8. Consumer Depot obtains its inventory through bulk purchases of overstocked inventory, customer returns, open box returns, liquidated, damaged, defective and broken items from retailers such as Staples and Best Buy.<sup>16</sup> Consumer Depot sorts these items, evaluates them and then offers them for sale to the public through its retail store or through the internet.<sup>17</sup>

9. Consumer Depot has operated under a number of different eBay user ids and names including bargaindepot04, ubid-it, youbid2003, returndealz, techgraveyard, surplusdealz05, swdiscounters, factorydealz, mr-appliance, music-n-dvds and ubid-tn-01.<sup>18</sup> Consumer Depot has also referred to itself as Bargain Depot, Factory Dealz, Return Dealz and Surplus Dealz.<sup>19</sup>

## **B. The State's Allegations**

10. In its Amended Complaint,<sup>20</sup> the State alleges that all of the Defendants have engaged in numerous unfair and deceptive business acts and practices in connection with their business activities, and that since 2002, over twenty-one thousand (21,000) consumers

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<sup>13</sup> *Id.*, ¶ 17.

<sup>14</sup> *Id.*, ¶¶ 8 and 9 (Admitting ¶¶ 8 and 9 of Amended Complaint).

<sup>15</sup> *Id.*, ¶ 10.

<sup>16</sup> *Id.*, ¶ 14.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, ¶ 16.

<sup>19</sup> *Id.*

<sup>20</sup> Ex. C.

have lodged complaints against Defendants with the Tennessee Division of Consumer Affairs,<sup>21</sup> the Better Business Bureau,<sup>22</sup> the Federal Trade Commission, the Internet Fraud Complaint Center and the Tennessee Attorney General's Office,<sup>23</sup> or posted negative feedback against Defendants on eBay.<sup>24</sup> The State further alleges that there have been so many complaints filed against Fike and Consumer Depot at the Greater Nashville Better Business Bureau, ("BBB"), that the BBB has simply stopped accepting them, and now refers complaining consumers directly to the Tennessee Attorney General's Office.<sup>25</sup>

11. The State alleges that the majority of complaints against Consumer Depot and the other Defendants involve allegations that they fail to deliver products as advertised or promoted.<sup>26</sup> The State alleges that consumers often receive broken, defective or empty products, or nothing at all, and that the Defendants regularly refuse to remedy or correct such problems, act in bad faith, refuse to honor their representations, contradict their representations and/or refuse to issue refunds.<sup>27</sup>

### **C. The Affirmative Defenses at Issue**

12. In their Answer to the State's Amended Complaint, the Defendants denied most of the State's above allegations and asserted eight affirmative defenses as follows:

65. Defendants assert that the claims for which the State seeks relief are based upon individual transactions that each constitutes a binding contract, and

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<sup>21</sup> Answer, ¶ 18, Ex. A.

<sup>22</sup> *Id.* and Amended Complaint, Ex. C.

<sup>23</sup> *Id.*

<sup>24</sup> *See* Amended Complaint, ¶ 19, Ex. C.

<sup>25</sup> *Id.*, ¶ 18.

<sup>26</sup> *Id.*, ¶ 20.

<sup>27</sup> *Id.*

that the state's claims are therefore barred by the law applicable to contract. (hereinafter the "**binding contracts**" defense);<sup>28</sup>

66. Defendants assert that the claims for which the State seeks relief are barred by the doctrine of assumption of risk. (hereinafter the "**assumption of risk defense**");<sup>29</sup>

67. Defendants assert that the claims for which the State seeks relief are barred by the doctrine of estoppel. (hereinafter the "**estoppel defense**";<sup>30</sup>

68. Defendants assert that the claims for which the State seeks relief are barred by the doctrine of laches. (hereinafter the "**laches defense**";<sup>31</sup>

69. Defendants assert that the claims for which the State seeks relief are barred by the doctrine of waiver. (hereinafter the "**waiver defense**";<sup>32</sup>

70. Defendants assert that the claims for which the State seeks relief are barred by the doctrine of accord and satisfaction. (hereinafter the "**accord and satisfaction defense**";<sup>33</sup>

71. Defendants assert that the claims for which the State seeks relief are barred by the statute of limitations. (hereinafter the "**statute of limitations defense**";<sup>34</sup>

72. Defendants assert that Consumer Depot operates in accordance with the customs, practices and policies of eBay and consistent with the practices of on-line websites for similar products. (hereinafter the "**others made me do it defense**"), *Id.*

See Answer to Amended Complaint, ¶¶ 65 - 72, Ex. A.

13. Defendants also included a ninth paragraph following their affirmative

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<sup>28</sup> Answer, ¶ 65, Ex. A.

<sup>29</sup> *Id.*, ¶ 66.

<sup>30</sup> *Id.*, ¶ 67.

<sup>31</sup> *Id.*, ¶ 68.

<sup>32</sup> *Id.*, ¶ 69.

<sup>33</sup> *Id.*, ¶ 70.

<sup>34</sup> *Id.*, ¶ 71.

defenses, purporting to reserve a “right” to later assert additional affirmative defenses, which is also at issue in the instant motion. *Id.*, ¶ 73

**D. The Defendants’ Discovery Responses Regarding Their Affirmative Defenses**

14. On July 2, 2007, the State served discovery on the Defendants, including certain interrogatories. Among other things, the State’s interrogatories inquired into the factual basis for the Defendants’ affirmative defenses. *See* Interrogatories 5 - 29 in Defendants’ Response to Plaintiff State of Tennessee’s Third Set of Interrogatories to Defendants, Ex. B.

(1) The “Binding Contract Defense”

15. With respect to the Defendants’ first affirmative defense, the “**binding contract**” defense,<sup>35</sup> the State posed the following interrogatory question to the Defendants:

Interrogatory No. 5. With respect to your first affirmative defense, set forth in paragraph 65 of your Answer to the Amended Complaint, do you allege that the State of Tennessee has entered into a binding contract with defendants?<sup>36</sup>

Defendants responded as follows:

ANSWER: No.<sup>37</sup>

16. The State’s Interrogatory No. 7 followed up to this response and asked the following question:

Interrogatory No. 7. If you answered Interrogatory No. 5, above, in the negative, please identify the parties that you allege entered into a binding contract, and set forth the facts which explain why such a contract operates to bar the state’s claims

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<sup>35</sup> *Id.*, ¶ 65.

<sup>36</sup> *See* Interrogatory No. 5, Ex. B.

<sup>37</sup> *Id.*

in this action.<sup>38</sup>

Defendants, in turn, identified such “parties” as themselves and their customers:

ANSWER: The alleged victims for which the State claims recompense. In the claimed instances of damages or violations by these Dependants, the nature of the transaction was fully explained to the customers, as were any risks attendant to the transaction, and the customers had to indicate that they clearly understood the transaction into which they were entering. In addition, some of the consumers never paid for the items that they agreed to buy. Finally, the consumer had redress through the after-purchase procedure clearly explained by the defendants in the auction language.

17. The State posed similar interrogatories regarding all of the Defendants’ remaining affirmative defenses, including assumption of risk, estoppel, laches, waiver, accord and satisfaction, statute of limitations and industry custom. *See* Int. Nos. 5 - 29, Ex. B.

18. Defendants answered almost all of these remaining Interrogatories by referring the State back to their Answer to Interrogatory No. 7,<sup>39</sup> above, and in all instances, by referring to some alleged right or defense which the Defendants maintained regarding a third-party such as a customer,<sup>40</sup> competitor,<sup>41</sup> or eBay.<sup>42</sup>

(2) The “Assumption of the Risk” Affirmative Defense

19. With respect to the Defendants’ second affirmative defense, the “**assumption of risk**” defense, the State posed the following interrogatory to Defendants:

Interrogatory No. 8. With respect to your second affirmative defense, set forth in paragraph 66 of your Answer to the Amended Complaint, do you allege that the State of Tennessee has assumed a risk in connection with this matter?<sup>43</sup>

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<sup>38</sup> *See* Interrogatory No. 7, Ex. B.

<sup>39</sup> *See* Answers to Interrogatories 10 - 12, 15 and 18, Exhibit B.

<sup>40</sup> *See* Answers to Interrogatories 7, 10 - 12, 15 and 18 - 19, Ex. B.

<sup>41</sup> *See* Answers to Interrogatories 20, 24, 25 - 29, Ex. B.

<sup>42</sup> *See* Answers to Interrogatories 20 - 23, Ex. B.

<sup>43</sup> *See* Answer to Interrogatory No. 8, Ex. B.



Defendants, in turn, responded as follows:

ANSWER: No.

20. The State followed up with Interrogatory No. 10 and asked the following question:

Interrogatory No. 10. If you answered Interrogatory No. 8, above, in the negative, please identify the person or persons that you allege assumed a risk and set forth the facts which explain the nature of the risk assumed and why such an alleged assumption would operate to bar the State's claims in this action.

Defendants, in turn, identified such "person" or "persons" as follows:

ANSWER: See Answer to Interrogatory No. 7 herein.

(emphasis added).

21. As previously noted, Defendants' answer to Interrogatory No. 7 identified "[t]he alleged victims for which the State claims recompense" and referred to the Defendants commercial relationship between themselves and their customers.<sup>44</sup>

(3) The "Estoppel" Affirmative Defense

22. The State posed similar interrogatories with respect to the Defendants' "estoppel" affirmative defense:

Interrogatory No. 11. With respect to your third affirmative defense, set forth in paragraph 67 of your Answer to the Amended Complaint, please identify the facts which support your assertion that the State of Tennessee is estopped from asserting the claims in this action.<sup>45</sup>

Defendants, in turn, responded as follows:

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<sup>44</sup> See Answer to Interrogatory No. 7, Ex. B.

<sup>45</sup> See Answer to Interrogatory No. 8, Ex. B.

**ANSWER: See Answer to Interrogatory No. 7 herein.**

(emphasis added).

23. The Defendants' "estoppel" defense is therefore also predicated upon the Defendants relationships with their customers.<sup>46</sup>

(4) The "Laches" Affirmative Defense

24. With respect to Defendants' "**laches**" defense, the State asked:

Interrogatory No. 12. With respect to your fourth affirmative defense, set forth in paragraph 68 of your Answer to the Amended Complaint, please identify the facts which support your assertion that the claims asserted by the State of Tennessee in this action are barred by the doctrine of laches.<sup>47</sup>

Defendants, in turn, responded as follows:

**ANSWER: See Answer to Interrogatory No. 7 herein.**

(emphasis added).

25. The Defendants' "laches" defense also relies upon the Defendants' alleged relationships with their customers.<sup>48</sup>

(5) The "Waiver" Affirmative Defense

26. With respect to Defendants' "**waiver**" defense, the State asked:

Interrogatory No. 13. With respect to your fifth affirmative defense, set forth in paragraph 69 of your Answer to the Amended Complaint, do you contend that the State of Tennessee has waived any or all of the claims asserted in this action?<sup>49</sup>  
Defendants responded as follows:

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<sup>46</sup> See Answer to Interrogatory No. 7, Ex. B.

<sup>47</sup> See Answer to Interrogatory No. 8, Ex. B.

<sup>48</sup> See Answer to Interrogatory No. 7, Ex. B.

<sup>49</sup> See Interrogatory No. 13, Ex. B.

ANSWER: No.<sup>50</sup>

27. The State then asked the following question:

Interrogatory No. 14. If you answer to Interrogatory 13, above, in the affirmative, please identify the facts that you allege demonstrate that the State has waived the claims asserted in this action.<sup>51</sup>

Defendants responded as follows:

ANSWER: N/A.<sup>52</sup>

28. The State then asked the following question:

Interrogatory No. 15. If you answer to Interrogatory 13, above, in the negative, please identify the person or persons that you allege caused a waiver of the State's claims in this action and set forth the facts which explain the nature of the waiver made and why such an alleged waiver would operate to bar any or all of the State's claims in this action.<sup>53</sup>

Defendants responded as follows:

ANSWER: See Answer to Interrogatory No. 7 herein.<sup>54</sup>

(emphasis added).

29. Thus, the Defendants also confirmed that their defense of "waiver" defense also referred to their alleged relationships with their customers.<sup>55</sup>

(6) The "Accord and Satisfaction" Affirmative Defense

30. Defendants made similar admissions with respect to the assertion of a so-called accord and satisfaction defense, as set forth in the following line of discovery

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<sup>50</sup> See Answer to Interrogatory No. 13, Ex. B.

<sup>51</sup> See Interrogatory No. 14, Ex. B.

<sup>52</sup> See Answer to Interrogatory No. 14, Ex. B.

<sup>53</sup> See Interrogatory No. 15, Ex. B.

<sup>54</sup> See Answer to Interrogatory No. 8, Ex. B.

<sup>55</sup> See Answer to Interrogatory No. 7, Ex. B.

questions from the State and respective answers from Defendants:

Interrogatory No. 16. With respect to your sixth affirmative defense, set forth in paragraph 70 of your Answer to the Amended Complaint, do you allege that the State of Tennessee has satisfied or otherwise caused an accord and satisfaction in connection with any of the claims asserted in this action?

ANSWER: No.

Interrogatory No. 17. If you answer to Interrogatory 16, above, in the affirmative, please identify the facts that you allege have caused an accord and satisfaction to take place and please explain why the State's claims in this action would be deemed resolved or otherwise satisfied by such an accord and satisfaction.

ANSWER: N/A

Interrogatory No. 18. If you answer to Interrogatory 16, above, in the negative, please identify the person or persons that you allege have created or caused an accord and satisfaction of the State's claims and set forth the facts which explain why such conduct operates as an accord and satisfaction of the State's claims in this action.

ANSWER: See Answer to Interrogatory No. 7 herein.<sup>56</sup>

(emphasis added).

31. The Defendants thus confirmed that their defense of "accord and satisfaction" again referred to their alleged relationships with their customers.<sup>57</sup>

(7) The "Statute of Limitations" Affirmative Defense

32. With respect to the Defendants' seventh affirmative defense, Defendants allege that the State was prevented from pursuing the instant action because of the applicability of a statute of limitations. The State presented the following interrogatory to Defendants regarding this claim:

Interrogatory No. 19. With respect to your seventh affirmative defense, set forth

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<sup>56</sup> See Interrogatories Nos. 16 - 18, Ex. B

<sup>57</sup> See Answer to Interrogatory No. 7, Ex. B.

in paragraph 71 of your Answer to the Amended Complaint, please identify (1) the applicable statute(s) of limitations; (2) the claim or claims you contend may be barred by such statute of limitations; and (3) the facts which support your contention that certain of the claims asserted by the State of Tennessee in this action are barred by such statute(s) of limitations.

Defendants responded as follows:

ANSWER: Any claims made more than one year after the discovery of the alleged violation of the Tennessee Consumer Protection Act are barred under T.C.A. § 47-18-110.

33. Defendants thus cited to the limitations provision identified in Tenn. Code Ann. § 47-18-110, which provides as follows:

Any action commenced pursuant to § 47-18-109 shall be brought within one (1) year from a person's discovery of the unlawful act or practice, but in no event shall an action under § 47-18-109 be brought more than four (4) years after the date of the consumer transaction giving rise to the claim for relief.

See Tenn. Code Ann. § 47-18-110.

(8) The "Others Made Me Do It" Affirmative Defense

34. With respect to the Defendants' eighth and last affirmative defense, Defendants alleged that the State was prevented from pursuing this action because "Consumer Depot operates in accordance with the customs, practices and policies of eBay and consistent with the practices of on-line websites for similar products."<sup>58</sup>

35. The State presented the following interrogatories regarding this defense and received the following partial responses from Defendants:

Interrogatory No. 20. With respect to your eighth affirmative defense, set forth in paragraph 72 of your Answer to the Amended Complaint, please identify all the "customs, practices and policies" of eBay that Consumer Depot "operates in accordance with...."

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<sup>58</sup> *Id.*, ¶ 72.

ANSWER: Consumer Depot was one of many liquidation sellers, including many prominent names, who were pioneers in ecommerce. The evolution of eBay and the resulting customized HTML product listings were being defined. What is accepted as part of the eBay culture is the result of eBay Sellers adapting to a maturing ecommerce platform. The positioning, content, disclaimers, terms and acceptable language for auctions has evolved over the last several years. Specific examples of this are visible on eBay today. Some of these include but are not limited to: SOLD AS IS, THIS AUCTION IS A CONTRACT, SERIOUS BIDDERS ONLY, 1ST TIME BUYERS, BY BIDDING YOU AGREE TO TERMS, STOCK PHOTO, FEEDBACK POLICY, etc.

Interrogatory No. 21. With respect to your response to Interrogatory 20, above, do you contend that eBay's "customs, practices and policies" override the applicability of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq.*?

ANSWER: No, but they help define reasonable customer expectations.

Interrogatory No. 22. If you answer to Interrogatory 21, above, in the affirmative, please identify the facts that you allege cause eBay's "customs, practices and policies" to override the applicability of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq.*

ANSWER: N/A

Interrogatory No. 23. If you answer to Interrogatory 21, above, in the negative, please identify the facts that demonstrate that Consumer Depot operates in accordance with eBay's "customs, practices and policies" and please explain why such conduct is relevant to any claim in this matter.

ANSWER: OBJECTION, as overbroad. Consumer Depot strives to operate in accordance with all of eBay's directives, strives to operate an honest business providing a service to the public, and has adopted the Court's recommendations of August 312, 2006.

Interrogatory No. 24. With respect to your eighth affirmative defense, set forth in paragraph 72 of your Answer to the Amended Complaint, please identify all the on-line auction websites you are referring to in this defense.

ANSWER: [See Answer to Interrogatory No. 24, Ex. A]

Interrogatory No. 25. With respect to your eighth affirmative defense, set forth in paragraph 72 of your Answer to the Amended Complaint, please identify all the "practices" that you are referring to in this defense.

ANSWER: The customs, practices and policies of eBay as issued by and made known by eBay.

Interrogatory No. 26. With respect to your eighth affirmative defense, set forth in paragraph 72 of your Answer to the Amended Complaint, please identify all the "similar products" you are referring to in this defense.

ANSWER: The electronic and computer goods, as described in the Amended Answer, for example in paragraphs 14, 15 and 16.

Interrogatory No. 27. With respect to your responses to Interrogatories 24 - 26, above, do you contend that Consumer Depot's operation consistent with the practices of on-line auction websites override the applicability of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq.*?

ANSWER: No but they help define reasonable customer expectations.

Interrogatory No. 28. If you answer to Interrogatory 27, above, in the affirmative, please identify the facts that you allege Consumer Depot's conduct to override the applicability of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq.*

ANSWER: N/A

Interrogatory No. 29. If you answer to Interrogatory 27, above, in the negative, please identify the facts that demonstrate that Consumer Depot operates in a manner consistent with the practices of on-line auction websites for similar products and please explain why such conduct is relevant to any claim in this matter.

ANSWER: See Answer to Interrogatory No. 23 herein.<sup>59</sup>

(9) Defendants' "Reservation of Right"

36. Following their last affirmative defense, Defendants included the following paragraph in the Answer to the Amended Complaint:

73. Defendants reserve the right to plead additional affirmative defenses as appropriate based upon Consumer Depot's and Mr. Fike's investigation and the discovery proceedings.

See Answer, ¶ 73, Ex. C.

37. No additional facts are required for the resolution of the State's instant motion.

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<sup>59</sup> See Answers to Interrogatories 20 - 29, Ex. A.

## **CONCLUSIONS OF LAW**

### **A. Standard for Summary Judgment**

1. Summary judgment is appropriate when “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” Tenn. R. Civ. P. 56.04; *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 302 (Tenn. Ct. App. 2008). Stated differently, a ruling on a motion for summary judgment involves only questions of law and not disputed issues of fact. *Id.*; *Owner-Operator Indep. Drivers Ass’n v. Concord EFS, Inc.*, 59 S.W.3d 63, 68 (Tenn. 2001). Because there are no disputed issues of fact before the Court here, summary judgment is appropriate.

### **B. The Attorney General’s Role in Protecting the Public May Not Be Impaired by a Defendant or Any Other Third Party**

2. The primary flaw in the Defendants’ assertion of the affirmative defenses at issue here is the Defendants’ continuing misapprehension of the nature of a civil law enforcement proceeding. The Attorney General is not the legal representative or attorney for the consumer victims in this case and the Attorney General brings this action in his sovereign role as chief law enforcement officer of the State of Tennessee. *State v. Health*, 806 S.W.2d 535 (Tenn. Ct. App. 1991). Defendants incorrectly argue that the Attorney General must address and refute individual consumer claims, but do not cite any cases or statutes in support of their position.

3. The instant law enforcement proceeding is not based on the Defendants’ alleged customer contracts or their third-party relationships, but, rather, is based on Defendants’ alleged unlawful conduct in the marketplace, regardless of whether a contract or



sale was ever consummated. The TCPA explicitly prohibits Defendants and others from acting to impair or in any way affect the Attorney General's ability and right to protect the public under the TCPA. Tenn. Code Ann. § 47-18-113(b) provides in pertinent part:

Further, no action of a consumer or other person can alter, amend, obstruct or abolish the right of the attorney general and reporter to proceed to protect the state of Tennessee and consumers or other persons within this state or from other states who are victims of illegal practices of persons located, wholly or in part, in Tennessee's borders.

(emphasis added). This provision makes clear that there is nothing a consumer, a defendant or any third person can do to "alter, amend, obstruct or abolish" the Attorney General's right to protect the public in a TCPA enforcement action. Therefore, contrary to the Defendants' arguments, the alleged "relationships" between Defendants and their customers, competitors or eBay is legally irrelevant to the question of whether defendants engaged in unlawful conduct under the TCPA.

4. While Tenn. Code Ann. § 47-18-113(b) seems to be dispositive of the present controversy, it is important to note that Defendants' affirmative defenses would nevertheless be inapplicable in this case as a matter of law for many other statutory and common law reasons, which will be briefly addressed below.

**C. "Third Party" Defenses Are Not Available in Law Enforcement Proceedings**

5. As a preliminary matter, it should be noted that in Tennessee, there is no such thing as an affirmative defense based on the "law applicable to contract." *See* 3 N. McLean, Tenn. Prac. Rules of Civil Procedure Ann., § 8:6 (2007 - 2008) and Tenn. R. Civ. P. 8.03. Tennessee law does not recognize such an affirmative defense. Defendants also fail to "set

forth affirmatively facts in short and plain terms relied upon” which constitute this, or any one of their other affirmative defenses as required by Tenn. R. Civ. P. 8.03. Under Tennessee law, any of these reasons standing alone is sufficient to warrant partial summary judgment in favor of the State.

6. The majority of the Defendants’ affirmative defenses also do not apply in this case because they constitute inapplicable “third-party” defenses which are based on Defendants’ alleged customer contracts or relationships with others, rather than with the State. For example, Defendants’ first affirmative defense (the “**binding contracts**” defense) asserts the following:

65. Defendants assert that the claims for which the State seeks relief are based upon individual transactions and that each constitutes a binding contract, and that the State’s claims are therefore barred by the law applicable to contract.

See Answer, ¶ 65, Ex. A.

7. The State provided Defendants with an opportunity to address the merits of their affirmative defenses through discovery. Defendants’ answers to these interrogatories, however, confirmed the impropriety of their responses. When asked whether the State had entered into the “binding contracts” with the Defendants, Defendants admitted that they had no contractual relationships with the State. *See* Interrogatory No. 5, Ex. B. The State also asked the Defendants to identify the “parties” they alleged had entered into these “binding contracts” and in response, Defendants identified such “parties” as themselves and their customers. *See* Ex. B. In sum, Defendants are claiming that any alleged contracts they may have had with their third-party customers can somehow be asserted against the Attorney General.

8. The State proffered similar interrogatories to Defendants regarding all their

remaining affirmative defenses and Defendants responded much the same way by referring back to their answer to Interrogatory No. 7 for their affirmative defenses of **assumption of the risk, estoppel, laches, waiver and accord and satisfaction**. See Ex. B. Defendants also relied on third-party conduct for their **statute of limitations** and the **others made me do it** defenses. *Id.* Thus, Defendants rely on third-party contracts as the direct basis for six of their eight affirmative defenses and rely on third party conduct as the basis for their remaining two affirmative defenses. *Id.* As already indicated, Tenn. Code Ann. §47-18-113(b) seems dispositive on this point. Nevertheless, as set forth below, most courts have rejected similar attempts to curb a law enforcement authority's public protection powers.

(2) The United States Supreme Court Has Unequivocally  
Rejected Defendants' Third-Party Defenses Argument

9. In *E.E.O.C. v. Waffle House*, 534 U.S. 279 (2002), the United States Supreme Court unequivocally rejected the notion that third-party contract defenses may be asserted against the government in a law enforcement proceeding. Significantly, the Supreme Court held that a private, third party contract cannot bind the government in a law enforcement proceeding.

10. In *Waffle House*, a restaurant employee suffered a seizure sixteen days after he began working at a South Carolina Waffle House restaurant. Shortly after his seizure, Waffle House terminated the employee. The fired employee subsequently filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that his discharge violated the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* ("ADA"). See *Waffle House*, 534 U.S. at 283. After conciliation efforts failed, the

EEOC filed a civil law enforcement proceeding against Waffle House alleging violations of the ADA. *Id.* Although the fired employee was not a party to the EEOC's law enforcement action, Waffle House filed a petition under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, ("FAA") to force the EEOC into arbitration, based on the fact that there was an arbitration clause in the fired employee's employment contract. 534 U.S. at 284. Waffle House argued that the EEOC could be compelled to arbitrate because the EEOC was suing on behalf of the employee. *Id.*

11. The Supreme Court rejected Waffle House's argument and held that the EEOC could bring a discrimination action on behalf of an employee even where the employee was unable to do so on his own due to contract restrictions. In holding that the EEOC could not be deprived of its statutory authority by an agreement to which it was not a party, the Supreme Court specifically recognized that *the government does not stand in the "shoes" of individual victims* and its claims against a wrongdoer "are not merely derivative" of individual claims. *Id.* at 297 (emphasis added). The Court further confirmed that when the government brings a law enforcement action, it may obtain all appropriate relief, including restitution, for individuals who might otherwise be barred from obtaining such relief on their own. *Id.* at 295-96. Significantly, the Court held that monetary relief in the form of restitution is often a better deterrent to future violations of the law than an injunction, and even when the government pursues entirely victim-specific relief, it is acting to "vindicate a public interest, not simply provide make-whole relief." *Id.* The Supreme Court therefore unequivocally confirmed that a law enforcement authority cannot be held to the terms of a private, third-party contract.

(3) Other Courts Have Also Rejected Defendants' "Third Party" Defenses Argument in Consumer Protection Enforcement Cases

12. Another instructive case on point is *State v. Cross Country Bank, Inc.*, 703 N.W.2d 562 (Minn. Ct. App. 2005). *Cross Country Bank* involved a similar issue raised in the context of a consumer protection enforcement action brought by a state attorney general. A temporary injunction was entered against the defendant for violating Minnesota's consumer protection statutes. On appeal, the defendant argued that the arbitration provisions in its customer contracts could be asserted against the Attorney General in the enforcement proceeding. The defendant also argued that when the State acted under its *parens patriae* authority, it stepped into the shoes of the defendant's customers. *Cross Country Bank*, 703 N.W.2d at 568-71. Citing *Waffle House*, 534 U.S. at 293-96, the appellate court rejected the defendant's argument and held that the State was not bound by private contractual obligations because it was not a party to the contracts. *Id.* at 571.

13. As a practical matter, this proposition makes sense. Tennessee has long recognized the rule that a non-party to a contract cannot be bound by that contract. *See, e.g., Cousins Properties of Tennessee, Inc. v. Karr*, 526 S.W.2d 498, 501 (Tenn. App. 1975). Furthermore, it would be illogical to permit a wrongdoer to avoid prosecution based on a private contract he executes with his victim. Thus, the State's argument is not only consistent with basic contract law, it is also consistent with fundamental public policy. The fact that the Defendants may have had "binding contracts" with their customers, *i.e.*, the consumer victims in this case, is simply irrelevant to the question of whether the Defendants engaged in deception.

(4) The Attorney General Represents the Public Interest of the State  
And Not The Private Interests of Individual Consumer Victims

14. Defendants' misapprehension of the law also manifests as confusion over the Attorney General's sovereign role as *parens patriae*, or protector of the public, with a private attorney's role in representing a client. Under the doctrine of *parens patriae*,<sup>60</sup> the State acts in its quasi-sovereign, protective capacity and "becomes, in effect, the embodiment of its citizens. A harm to the individual citizens becomes an injury to the state, and the state in turn becomes the plaintiff." *Cross Country Bank*, 703 N.W.2d at 569 (quoting *State v. Standard Oil Co.*, 568 F.Supp 556, 565 (D. Minn. 1983).

15. When the Attorney General brings an action involving consumer protection, the Attorney General is not a party plaintiff. The plaintiff is the people of the State and the Attorney General, as the "people's" attorney, sues in a protective capacity. *People v. Volkswagen of America, Inc.*, 342 N.Y.S.2d 749, 751 (N.Y. Supr. 1973). Moreover, when the Attorney General seeks restitution in a consumer protection case, he does so not simply to compensate injured consumer victims, but to effectuate the intended purpose of the state consumer protection law: to promote a safe, honest and fair marketplace. *See Cross Country Bank*, 703 N.W.2d at 569 (even where Attorney General seeks victim-specific relief, he pursues such claims not with the purpose of obtaining relief for particular victims, but to vindicate a 'quasi-sovereign' interest that "grows out of, but surpasses, the interest of

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<sup>60</sup> According to Black's Law Dictionary (8th ed. 2004), *parens patriae* literally means "parent of his or her country" and describes the role of the State as sovereign in protecting its citizens. The doctrine does not involve the State stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves. *State v. Cross Country Bank, Inc.*, 703 N.W.2d at 569.

individual citizens.”); *People v. Lann*, 587 N.E.2d 521, 524 (Ill. App. Ct. 1991) (Attorney General consumer protection action is a “law enforcement action designed to protect the public, not to benefit private parties.”)

16. Courts have noted that in certain cases, the role of the Attorney General as a protector of the public may even be inconsistent with the welfare of the consumer victims he represents, and he does not have the responsibility to seek the class' best interest. *See, e.g., People v. Pacific Land Research Co.*, 569 P.2d 125, 129 (Cal. Supr. 1977). Furthermore, even when the Attorney General brings an action to recover restitution for only one consumer, he is still acting in the public interest. *State v. Brotherhood Bank and Trust Co.*, 649 P.2d 419, 423 (Ct. App. Kans. 1982) (“Whether one consumer, ten or one hundred consumers, may receive actual damages as a result of a suit by the attorney general does not diminish the overall benefit to the state’s interest in protecting consumers against deceptive and unconscionable acts and practices.”)

17. The Attorney General’s role as the protector of the public has been a fundamental part of Tennessee jurisprudence and can be traced back to the common law. The leading Tennessee case on this point is *State v. Heath*, 806 S.W.2d 535 (Tenn. Ct. App. 1991).

18. In *Heath*, the Tennessee Court of Appeals confirmed that as the chief law enforcement officer of the State, the Attorney General has broad public protection authority, even if such authority is not specifically authorized by statute and even if the interests of only a few consumers are involved. Significantly, the Court of Appeals outlined the very broad

nature of the Attorney General's powers and the nature of his standing as follows:

The state attorney general has all common law powers of office, except insofar as they are restricted by statute and the attorney general's duties are numerous that the legislature does not attempt to identify each by statute. As the chief law enforcement officer of the state, the attorney general may exercise such authority as the public interest may require and may file suits necessary for the enforcement of state laws and public protection.

806 S.W.2d at 537. The court further confirmed that "the attorney general may participate in litigation of a private character where it bears on the interest of the public." *Id.* Cf. *People v. Centr-O-Mart* (1950) 214 P.2d 378 (Cal. Supr. 1950) and *Pierce v. Superior Court*, 37 P.2d 460 (Cal. Supr. 1934). Defendants have thus erroneously confused the Attorney General's role as protector of the public with the role of a private attorney who acts on behalf of the private interests of individual clients.

#### **D. Contract Defenses Do Not Apply in TCPA Cases**

19. As a final note, even if valid contracts were in place between the State of Tennessee and the Defendants, or between the Defendants and their third-party customers, such fact would be irrelevant in a TCPA case. Well settled Tennessee law has long recognized that contract defenses do not apply in a TCPA case. See, e.g., *Morris v. Mack's Used Cars*, 824 S.W.2d 538, 540 (Tenn. 1992); *Tucker v. Sierra Builders*, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2005). The reason for this rule is because under the TCPA, the legal inquiry focuses on whether Defendants engaged in deception, not whether a contract was breached. Thus, "[t]he numerous defenses that are ordinarily available to a defendant in a tort or contract action are simply irrelevant to a TCPA inquiry." *Id.*

20. For example, in *Morris v. Mack's Used Cars*, the Tennessee Supreme Court



rejected a contract and warranty defense in a TCPA case. The Defendants attempted to avoid liability under the claim that certain written “as-is” disclaimers, which were part of their consumer contracts, were enforceable under the TCPA. The Supreme Court flatly rejected this argument and explicitly held that while disclaimers may be binding under the UCC, or contract law, or warranty law, they do not negate an action under the TCPA. *Id.* at 539 - 40.

21. Similarly, in *Smith v. Scott Lewis Chevrolet, Inc.*, 843 S.W.2d 9 (Tenn. Ct. App. 1992), the plaintiff had purchased a used truck from defendant and signed an “as-is” “no warranty” disclaimer as part of his purchase. The defendant represented that the truck had never been in an accident, but the plaintiff later learned that the truck had been “wrecked.” *Id.*, 9 - 10. The jury found in favor of the plaintiff on his TCPA claim. *Id.* The defendant appealed, claiming among other things, that the “as-is” “no warranty” clause disclaimed all prior representations under the TCPA. *Id.* Relying on *Morris v. Mack's Used Cars*, the Court of Appeals rejected this argument and held that under *Morris*, the TCPA “creates a separate and distinct cause of action for unfair or deceptive acts or practices.” *Id.* at 11. The Court also acknowledged:

[T]o hold otherwise would vitiate the ‘broad remedial intent of the Act to say that someone who has successfully disclaimed a contractual warranty has a license to engage in unfair or deceptive consumer practices.

*Id.* In reaching its decision, the Court of Appeals considered a number of cases from other jurisdictions that also held that “as-is” or “no warranties” disclaimers were not defenses in consumer protection cases. *Id.*

22. Thus, regardless of what a contract between an alleged wrongdoer and his

customers may or may not say, the existence of such a contract is simply irrelevant to the question of whether the wrongdoer engaged in deception. *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex. 1985) (Traditional contractual notions do not apply in consumer protection cases); *Rollins, Inc. v. Heller*, 454 So.2d 580, 585 (Fla. Ct. App. 1984) (Any attempt to contractually limit liability for deceptive trade practices by contract would be contrary to public policy and unenforceable); *Ford Motor Co. v. Mayes*, 575 S.W.2d 480, 485-86 (Ky. Ct. App. 1978) (Manufacturer could not hide behind provision in contract making the express warranty the sole remedy of the buyer). Stated differently, any consumer contract that is based on unfair, deceptive or misleading acts or practices in violation of the TCPA is no contract, *ab initio*. Cf. *Telecomm Directories, Inc. v. Commonwealth*, 833 S.W.2d 848, 850 (Ct. App. Ky. 1992).

23. Because Defendants rely upon their third-party contractual relationships with their customers as the basis for the affirmative defenses of **binding contracts, assumption of the risk, estoppel, laches, waiver and accord and satisfaction**, such defenses also fail for this reason.

**E. Five of the Affirmative Defenses at Issue May Not Be Asserted Against the State as Sovereign**

24. The State has already demonstrated that the first six of Defendants' eight affirmative defenses do not apply in this case as a matter of law. There is an added, equally compelling reason which prevents the Defendants from asserting at least five of their affirmative defenses against the State, including the defenses of **estoppel, laches, waiver, accord and satisfaction and statute of limitations**. Courts also universally recognize that the defenses which may be appropriate in an action by private parties may not be raised in a

consumer protection law enforcement action brought by the Attorney General. *See, e.g., People v. Pacific Land Research Co.*, 569 P.2d at 131. *Cf. State v. Brotherhood Bank and Trust Co.*, 649 P.2d at 424 (“[T]here is no express provision in the act subjecting the state to all defenses which would be available against a private consumer.”)

(1) Equitable Defenses May Not Be Asserted Against the Government

25. As a general rule, equitable defenses such as laches, waiver and estoppel may not be asserted against the government when it is acting in its sovereign capacity to enforce a public right or protect the public interest. *U. S. v. Reader's Digest Ass'n, Inc.*, 464 F.Supp. 1037, 1265-69 (D. Del. 1979) (“The equitable defenses of laches, waiver and estoppel have no application here, because they are based on actions taken in the public interest by [the FTC]”). While the State has already set forth a number of reasons confirming that such defenses do not apply in this case, these defenses are also inapplicable because they may not be asserted against the State when it is acting in its role as sovereign.

26. The rule that equitable defenses do not apply in law enforcement proceedings has been regularly recognized and applied in state and federal consumer protection and deceptive trade enforcement cases. Thus, numerous courts have rejected the defense of laches in consumer protection or deceptive trade law enforcement proceedings. *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 79 - 80 (1934); *State v. Astro Shuttle Arcades, Inc.*, 633 N.Y.S.2d 304, 305 - 06 (N.Y. Supr. 1995); *People v. Arthur Murray, Inc.*, 238 Cal.App.2d 333, 347 (1965).

27. Similarly, courts have universally held that estoppel will not bar a consumer

protection or deceptive trade enforcement case. *Double-Eagle Lubricants, Inc. v. FTC*, 360 F.2d 268, 270 (10th Cir. 1965); *P. Lorillard Co. v. FTC*, 186 F.2d 52, 55-56 (4th Cir. 1950).

28. And courts have rejected the defense of waiver in consumer protection enforcement proceedings. *United States v. Reader's Digest Ass'n, Inc.*, 464 F.Supp. at 1265-69 (Holding that the equitable defense of waiver had no application in FTC consumer protection case.) (citing *United States v. J.B. Williams Co.*, 498 F.2d 414, 434-35 (2nd Cir. 1974); *United States v. Beatrice Foods Co.*, 493 F.2d 1259, 1265-69 (8th Cir. 1974)).

29. The reason the law does not permit equitable defenses to be asserted against the government in law enforcement proceedings is because if permitted, these defenses would operate to defeat the effective operation of a policy adopted to protect the public interest. *People v. Arthur Murray, Inc.*, 238 Cal.App.2d 333 (1965). The Defendants' equitable affirmative defenses of laches, waiver and estoppel not only fail the reasons previously set forth, they also fail because as a matter of law, they may not be asserted against the State in a law enforcement proceeding.

(2) Accord and Satisfaction May Not Be Asserted Against the Government

30. Courts also recognize that law enforcement authorities like the Tennessee Attorney General are not precluded from seeking monetary and other relief for consumers who may have previously litigated or settled claims with wrongdoers. See *Herman v. South Carolina National Bank*, 140 F.3d 1413, 1424 - 25 (11th Cir. 1998) (Private class action settlement under ERISA did not preclude Secretary of Labor from bringing separate government ERISA claim seeking equitable relief including restitution.) The reason for this rule is similar to the third-party contract rule, *i.e.*, the Attorney General is not bound by

individual consumer contracts. *Id.*

31. This rule is consistent with the underlying policy reason for providing restitution in a law enforcement proceeding. Restitution in civil law enforcement proceedings is not simply designed to “compensate the victims of fraud;” restitution serves the very important function of “[depriving] the wrongdoer of his ill-gotten gain.” *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th cir. 1996). In other words, restitution “prevents the defendant from being unjustly enriched by his fraud.” *FTC v. Febre*, 128 F.3d 530, 537 (7th Cir. 1997). *See also FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) (“The remedy of restitution seeks to correct unjust enrichment ... [and] protect consumers from economic injuries.”); *Cearly v. Wieser*, 727 P.2d 346 (Az. Ct. App. 1986) (An agreement to refund monies in the event the purchaser is dissatisfied is not a defense to consumer fraud). The goals of protecting the public and disgorging ill gotten gains from a wrongdoer could not be accomplished if the wrongdoer could escape liability or keep unlawful proceeds simply by entering into a contract with his victims.

32. The *E.E.O.C. v. Waffle House*, 534 U.S. 279 (2002) decision supports this important rule. In *Waffle House*, the Supreme Court confirmed that when the government brings an enforcement action, it may obtain all appropriate relief, including restitution, *for individuals who might otherwise be barred from obtaining such relief on their own.* *Id.* at 295-96. The ruling in *Waffle House* thus stands for the proposition that contractual impediments in a victim’s contract will not impede law enforcement proceedings. Therefore, even if all the consumer victims at issue here had surrendered or compromised their individual monetary claims against the Defendants, that fact would be irrelevant and would

not operate to bar the Attorney General from seeking full restitution on their behalf. *Id.* See also *FTC v. U.S. Oil and Gas Corp.*, No. 8301702, 1987 U.S. Dist. LEXIS 16137, at \*56-\*57 (S.D. Fla. July 10, 1987) (FTC not barred from seeking restitution for consumers who signed releases and received partial refunds).

33. In addition to the fact that the Defendants' affirmative defense of accord and satisfaction fails to "set forth affirmatively facts in short and plain terms relied upon" as required by Tenn. R. Civ. P. 8.03 and constitutes an inapplicable third-party defenses based on Defendants' relationships with their customers, this defense is also unavailable to Defendants as a matter of law because it may not be asserted to bar or limit restitution in a law enforcement proceeding.

(3) Statutes of Limitations Do Not Run Against the State

34. The Defendants' seventh affirmative defense, *i.e.*, the "statute of limitations" defense," is also inapplicable as a matter of law because statutes of limitations do not run against the State. The Defendants seventh affirmative defense states as follows:

71. Defendants assert that the claims for which the State seeks relief are barred by the statute of limitations. (F23)

35. The State preliminarily notes that as is the case with Defendants' other affirmative defenses, Defendants failed to "set forth affirmatively facts in short and plain terms relied upon" as the basis for this affirmative defense as required by Tenn. R. Civ. P. 8.03. Defendants also failed to identify which statute of limitations they rely upon and fail to explain the facts or dates that are at issue in this defense. See also 3 N. McLean, Tenn. Prac. Rules of Civil Procedure Ann., § 8:6 (2007 - 2008). Notwithstanding this defect, the State

provided Defendants with an opportunity to explain the basis for their “statute of limitations” defense and proffered the following interrogatory to Defendants:

Interrogatory No. 19. With respect to your seventh affirmative defense, set forth in paragraph 71 of your Answer to the Amended Complaint, please identify (1) the applicable statute(s) of limitations; (2) the claim or claims you contend may be barred by such statute of limitations; and (3) the facts which support your contention that certain of the claims asserted by the State of Tennessee in this action are barred by such statute(s) of limitations. (F54)

Defendants responded as follows:

ANSWER: Any claims made more than one year after the discovery of the alleged violation of the Tennessee Consumer Protection Act are barred under T.C.A. § 47-18-110. (F55)

36. Tenn. Code Ann. § 47-18-110 is a statute of limitations provision specifically designated for *private* causes of action under the TCPA and provides as follows:

Any action commenced pursuant to § 47-18-109 shall be brought within one (1) year from a person’s discovery of the unlawful act or practice, but in no event shall an action under § 47-18-109 be brought more than four (4) years after the date of the consumer transaction giving rise to the claim for relief.

See Tenn. Code Ann. § 47-18-110 (emphasis added). In turn, Tenn. Code Ann. § 47-18-109, entitled “**Private right of action**” (emphasis in the original) sets forth the statutory provisions which govern private consumer cases under the TCPA. These provisions do not apply to the State. Under the TCPA, the special law enforcement provisions that govern Attorney General enforcement actions, including the instant proceeding, are set forth in Tenn. Code Ann. § 47-18-108. Tenn. Code Ann. § 47-18-108 does not set forth a time limitation for Attorney General actions. Defendants’ discovery responses once again confirm that they are not relying upon a limitations provision that is applicable to the State, but instead, have again improperly asserted an affirmative defense which is based on the relationship that is in place

between the Defendants and their third-party customers.

37. Even if the Defendants had a lawful basis for asserting a statute of limitations defense against the State, Tennessee jurisprudence has long recognized that statutes of limitations do not apply to the State when it is acting as a sovereign. *See, e.g., In re Estate of Lizzie Tomlin Daugherty*, 166 S.W.3d 185, 191 (Tenn. App. 2004) (“The common law doctrine of *nullum tempus occurit regi* ... is literally translated as ‘time does not run against the king’ [and] prevents an action brought by the State from being dismissed due to the expiration of the statutory period of limitations normally applicable to the specific type of action.”) Moreover, the explicit omission of a limitations provision in Tenn. Code Ann. § 47-18-108, notwithstanding the inclusion of such a provision for private causes of action in Tenn. Code Ann. § 47-18-109, is consistent with such fundamental Tennessee jurisprudence.

38. Ample authority from other jurisdictions that also holds that statutes of limitation may not be asserted against the State. “Many courts interpret the powers of their State’s Attorney General broadly and refuse to restrict the Attorney General’s authority to protect the public’s interest where limitations would rob the statute of its purpose.” *State v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516, 527 (W.V. Supr. 1995). Courts have thus refused to impose time limitations in consumer protection enforcement actions brought by state attorney generals. *State v. Brotherhood Bank and Trust Co.*, 649 P.2d at 422.

39. In addition to all the reasons previously set forth regarding the inapplicability of the Defendants’ affirmative defenses based on the Defendants’ third-party contracts or relationships with their customers, a statute of limitations defense would not apply here because statutes of limitations may not be asserted against the State. Summary judgement is



therefore appropriate in favor of the State on the issue of the inapplicability of Defendants' affirmative defense of statute of limitations.

**F. Business Policy, Practices or Custom is Not a Defense  
For Unlawful Business Conduct Under the TCPA**

40. The Defendants' last affirmative defense, the "**others made me do it**" defense," is also inapplicable as a matter of law and has been universally rejected by the courts as a defense to deceptive conduct. Defendants' eighth affirmative defense provides as follows:

72. Defendants assert that Consumer Depot operates in accordance with the customs, practices and policies of eBay and consistent with the practices of on-line websites for similar products. (the "**others made me do it**" defense). (F23)

41. Defendants seem to be claiming that because they operate in accordance with others' business customs, practices and policies, as well as with the practices of their on-line competitors, such fact would serve as a defense in this case. As a preliminary matter, the State notes that under Tennessee law, there is no such thing as an affirmative defense based on a Defendants' operation "in accordance with the customs, practices and policies of eBay and consistent with the practices of on-line websites for similar products." *See* 3 N. McLean, Tenn. Prac. Rules of Civil Procedure Ann., § 8:6 (2007 - 2008) and Tenn. R. Civ. P. 8.03. It is also unclear as to what customs, practices and policies" or "online websites" Defendants are referring to in this defense. Defendants do not "set forth affirmatively facts in short and plain terms relied upon" which constitute this, or any one of their other alleged affirmative defenses as required by Tenn. R. Civ. P. 8.03. Because of Defendants' failure to comply with Rule 8.03, this affirmative defense fails as a matter of law.

42. In response to discovery asking for the identity of all the “customs, practices and policies” of eBay that Consumer Depot “operates in accordance with,” Defendants responded:

ANSWER: Consumer Depot was one of many liquidation sellers, including many prominent names, who were pioneers in ecommerce. The evolution of eBay and the resulting customized HTML product listings were being defined. What is accepted as part of the eBay culture is the result of eBay Sellers adapting to a maturing ecommerce platform. The positioning, content, disclaimers, terms and acceptable language for auctions has evolved over the last several years. Specific examples of this are visible on eBay today. Some of these include but are not limited to: SOLD AS IS, THIS AUCTION IS A CONTRACT, SERIOUS BIDDERS ONLY, 1ST TIME BUYERS, BY BIDDING YOU AGREE TO TERMS, STOCK PHOTO, FEEDBACK POLICY, etc. (F61)

43. Defendants therefore seem to be arguing that to the extent they engaged in unlawful conduct, they did so because it was “part of the eBay culture.” *Id.* Even if true, the question of whether or not Defendants engaged in deception is not negated by the fact that a certain business “culture” may have been in place which fostered their unlawful conduct. The law has long recognized that the existence of a “sound business” or “economic” reason will not operate to excuse unlawful conduct. *Advertising Special Nat. Ass’n v. F.T.C.*, 238 F.2d 108, 118 (1st Cir. 1956). *See also People v. National Research Co. of Cal.*, 201 Cal. App. 2d 765, 778 - 79 (Cal. Ct. App. 1972) (Standards of fairness and honesty in trade should not be down-graded for reasons of economical expediency.) Moreover, even if deceptive conduct has become a common, recognized part of a particular industry, such fact will not operate as a defense. *See, e.g., FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493 - 94 (1922). Similarly, a practice does not cease to be unlawful simply because its deceptive nature is well known to industry, as opposed to consumers. *Heavenly Creations, Inc. v. FTC*, 339 F.2d 7, 8

(2d Cir. 1964). Unfair and deceptive conduct can never be justified on the grounds that it is needed either as a service to the consumer or to meet competition in the market. *Spiegel, Inc. v. F.T.C.*, 494 F.2d 59, 64 (7th Cir. 1974).

44. During discovery, the State asked the Defendants whether they were contending that eBay's "customs, practices and policies" override the applicability of the TCPA. (F61) Significantly, Defendants admitted that such customs, practices and policies did not override the application of the TCPA:

**ANSWER: No, but they help define reasonable customer expectations. *Id.***

(emphasis added). The remainder of the Defendants' response regarding "customer expectations" is irrelevant because even if true, it is fairly unlikely that the Defendants' customers reasonably "expected" to be defrauded. Thus, Defendants once again seem to be relying on irrelevant third party conduct as a defense for their own unlawful conduct.

45. The Defendants' eighth affirmative defense also refers to the Defendants' competitors' activities as the basis for their assertion that "Consumer Depot operates ... consistent with the practices of on-line websites for similar products." As before, the State proffered a series of interrogatories to the Defendants asking about this aspect of their eighth affirmative defense and specifically asked the Defendants to identify the "practices" that these other online websites engaged in, which excused the Defendants' behavior. *See* Int. No. 25, Ex. B.

46. Numerous consumer protection enforcement cases have rejected the notion that a particular business custom or practice is a defense for unlawful business conduct. *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922); *Spiegel, Inc. v. F.T.C.*, 494 F.2d 59 (7th Cir.

1974); *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 276 (6th Cir. 1970); *Heavenly Creations, Inc. v. FTC*, 339 F.2d 7 (2d Cir. 1964); *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961).

47. One of the leading cases on this point is *Spiegel, Inc. v. F.T.C.*, 494 F.2d 59 (7th Cir. 1974). Spiegel, a well known catalog retailer, advertised free trials and discounts to new and existing customers. Spiegel's offers appeared to be unconditional. New customers later learned, however, that they had to qualify for Spiegel "credit" in order to benefit from Spiegel's offers and existing Spiegel customers could not spend amounts over their Spiegel credit limits. The FTC ordered Spiegel to stop its advertising unless it "conspicuously disclose(d)" the added conditions and restrictions "in immediate conjunction" the offers. 494 F.2d at 62.

On appeal, Spiegel argued that it should have been permitted to introduce evidence which demonstrated that its conduct was better than its competitors' conduct. 494 F.2d at 64. The Seventh Circuit Court of Appeals rejected this argument and held that even if Spiegel's competitors were more deceptive, such evidence was irrelevant. *Id.*

48. Even if the Defendants were forced into deceptive conduct because of their competitors, such fact is not a defense. *DeGorter v. FTC*, 244 F.2d 270, 282 (9th Cir. 1957). Evidence of the activities of competition is not relevant since it is not a defense to a company using deceptive practices that its competitors are more deceptive. *Spiegel, Inc. v. F.T.C.*, 494 F.2d at 64.

49. The fact that eBay or the Defendants' competitors may have forced certain

business practices upon Defendants is irrelevant to the question of whether Defendants engaged in deception. Therefore, in addition to the fact that the Defendants' eighth affirmative defense (1) is not a recognized affirmative defense under Tennessee law; (2) fails to "set forth affirmatively facts in short and plain terms relied upon" as required by Tenn. R. Civ. P. 8.03 and (3) constitutes an inapplicable third-party defenses based on Defendants' relationships with eBay and their competitors, this defense is also unavailable to Defendants as a matter of law because it is unavailable under the TCPA. Defendants' eighth affirmative defense should be ruled inapplicable as a matter of law.

**G. Affirmative Defenses Must be Pled At the Outset**

50. In the last paragraph of the Defendants' affirmative defenses section of their Answer, Defendants also included a paragraph purporting to reserve "the right to plead additional affirmative defenses" at a later time:

73. Defendants reserve the right to plead additional affirmative defenses as appropriate based upon Consumer Depot's and Mr. Fike's investigation and the discovery proceedings. (F62)

51. Tennessee law does not recognize a "right" to later plead additional affirmative defenses. The Tennessee Rules of Civil Procedure do not provide for such a right, and indeed, well-settled Tennessee law holds that affirmative defenses which are not raised are forever waived. 3 N. McLean, Tenn. Prac. Rules of Civil Procedure Ann., § 8:6 (2007 - 2008). *Barrton Scientific, Inc. v. Moss*, 542 S.W.2d 375, 379 (Tenn. Ct. App. 1975). Moreover, courts which have considered this issue in the context of an FTC consumer protection enforcement action have rejected it. *See F.T.C. v. Bay Area Business Council, Inc.*, 2003 WL 21003711, \*3 (N.D. Ill. May 1, 2003) (Reservation of right to add other

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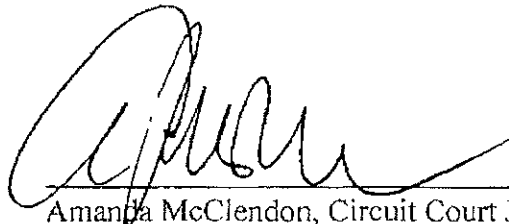
affirmative defenses improper and not allowed by Fed. R. Civ. P. 8).

52. Defendants' purported reservation of right is illusory and improper as a matter of law. The State respectfully requests that this Court rule that as a matter of law, there is no such thing as a reservation of right to later assert additional affirmative defenses.

### CONCLUSION

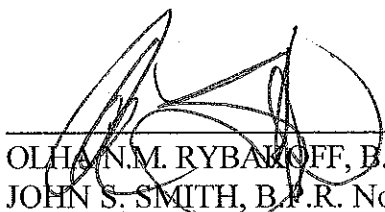
53. None of the affirmative defenses asserted by the Defendants apply in this TCPA enforcement case. Defendants' affirmative defenses do not apply as a matter of law under Tenn. Code Ann. § 47-18-113(b) because the Attorney General's ability to proceed on behalf of the public in a TCPA enforcement action may not be altered, amended, obstructed or in any way abolished by a defendant or other third party. Defendants' affirmative defenses are also inapplicable here because they (1) constitute third-party contract defenses which may not be asserted against the State as a non-party; (2) may not be asserted against the State in its role as sovereign; and/or (3) constitute legally irrelevant business defenses which are not applicable in TCPA cases. Defendants have also failed to properly plead their affirmative defenses as required by Tenn. R. Civ. P. 8.03 and have failed to provide a basis for the same in discovery. For all of these reasons, partial summary judgment shall be granted in favor of the State and all of the Defendants' affirmative defenses, as well as their alleged reservation of right to later assert other affirmative defenses, are hereby ruled inapplicable as a matter of law.

IT IS SO ORDERED.



Amanda McClendon, Circuit Court Judge

OFFICE OF THE ATTORNEY GENERAL

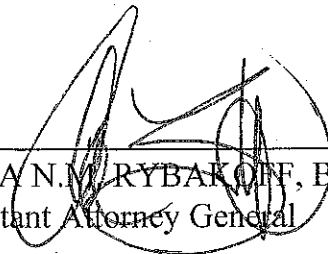


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**CERTIFICATE OF SERVICE**

I, OLHA N.M. RYBAKOFF hereby certify that on December 16, 2008, I caused a true and exact copy of the foregoing ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO PLAINTIFF, STATE OF TENNESSEE ON THE ISSUE OF THE INAPPLICABILITY OF DEFENDANTS' AFFIRMATIVE DEFENSES to be served by electronic mail and by placing a copy thereof in the United States First Class Mail, postage prepaid, addressed to:

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